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Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

David Wheeler,

Petitioner,

v.

Thomas F. White & Co. Inc. and Robert Angle,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

Petition for a Writ of Certiorari

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19 pp

Question Presented

May the artful pleading doctrine be extended to render state law and state remedies inoperative through the creation of federal question jurisdiction based upon a hypothetical federal nexus?

Table of Contents

Question Presented i

Table of Authorities iii

Petition for a Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statement of the Case 1

Reasons for Granting the Petition 3

Conclusion 7

Appendix

Memorandum of the Ninth Circuit Court of Appeals ..... App. 1

Proceedings of the United States District Court for the Central District of California ..... App. 4

Table of Authorities

Cases

Bright v. Bechtel Petroleum, Inc., 780 F. 2d 766 (9th Cir. 1986) 3, 4

Statutes

California Civil Code § 1798 et seq 2

California Civil Code § 1798.35 2

California Civil Code § 1798.45 . . . . . 2, 3

28 USC §§ 1331 3

28 USC §§ 1441 3

Law Review

Miller, *Artful Pleading: A Doctrine in Search of Definition*, 1998, 76 Texas Law Review 1781 2

Other Authorities

Wright, Miller, & Cooper, *Federal Practice and Procedure*, Jurisdiction 3d, §3722 pp 436-469. 5

Petition for a Writ of Certiorari

Petitioner David Wheeler respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals, entered in the above-entitled proceeding on July 11, 2000.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on July 11, 2000 (App., *infra*, page 1). The opinion of the U.S. District Court for the Central District of California was entered on March 23, 1998 (App., *infra*, page 4).

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on July 11, 2000. On November 24, 2000, the Ninth Circuit Court of Appeals denied a petition for panel rehearing and suggestion of rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statement of the Case

This appeal presents the question of whether the artful pleading doctrine may give a federal court authority to remove a case involving issues of state law only, by fabricating federal question jurisdiction beyond the four corners of the complaint from a hypothetical federal nexus that is merely incidental to the complaint. The imprecision of the artful pleading doctrine

has allowed the District Court here, under the purported authority of the artful pleading rule, to effect a striking expansion of federal question jurisdiction. In the process, state law and state remedies have been rendered inoperative, and plaintiff's remedial rights have been destroyed. This avenue would not have been open had the artful pleading doctrine been more strictly delineated as a rule of law. (*See* Miller, *Artful Pleading: A Doctrine in Search of Definition*, 1998, 76 Texas Law Review 1781.)

Wheeler brought a state law complaint against Thomas F White & Co., Inc. ("White") under the California Information Practices Act (Civil Code § 1798 et seq.) ("CIPA") for their refusal to correct an erroneous SSN number attached to David Wheeler in their records, upon demand. The CIPA provides the right to amend records at § 1798.35(a), and the right to sue at § 1798.45(b).

> 1798.35. Each agency shall permit an individual to request in writing an amendment of a record and, shall within 30 days of the date of receipt of such request:
>
> (a) Make each correction in accordance with the individual's request of any portion of a record which the individual believes is not accurate, relevant, timely, or complete and inform the individual of the corrections made in accordance with their request...
>
> 1798.45. An individual may bring a civil action against an agency whenever such agency does any of the following:

(a) ...

(b) Fails to maintain any record concerning any individual with such accuracy, relevancy, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, opportunities of, or benefits to the individual that may be made on the basis of such record, if, as a proximate result of such failure, a determination is made which is adverse to the individual.

White's persistent refusal to correct was a violation of state law. Wheeler sued White in California Superior Court seeking state-law remedies pursuant to § 1798.45 of the CIPA to compel White's correction of their records, and for recovery of damages.

White filed a notice of removal to federal court under 28 USC §§ 1331 and 1441, claiming that Wheeler had artfully pleaded what was in reality a federal question, by attempting to conceal a challenge to federal Internal Revenue Code and Treasury Regulations. White successfully persuaded the Court to look beyond Wheeler's state-law complaint so as to conclude that Wheeler had attempted to mask, through artful pleading, a federal question.

Reasons for Granting the Petition

White relied on *Bright v. Bechtel Petroleum, Inc.*, 780 F. 2d 766 (9th Cir. 1986) as the artful pleading authority applicable to Wheeler's complaint. However, the

circumstances in the instant case are so distinct to those in *Bright*, which exemplifies a proper application of the artful pleading doctrine, that *Bright* cannot provide authority to justify the District Court's remarkable departure from the well-pleaded complaint rule. The *Bright* Court was required to look beyond plaintiff's state-law complaint in order to make sense of what the plaintiff was actually talking about, and found he had artfully pleaded an essentially federal-law claim as a state-law claim, and thus federal jurisdiction was proper.

Here, the District Court did not look beyond Wheeler's complaint to glean essential additional information necessary to clarify what the complaint left uncertain or obscure, since Wheeler's state-law issues were well-pleaded. There was no mistaking what Wheeler was trying to do: correct records under state law. White had refused to correct them, yet had no lawful basis to refuse. Faced with Wheeler's suit, and unable to win on the facts, White fabricated nonessential federal questions that related to the complaint only hypothetically, and sought removal under the pretext that Wheeler had avoided these federal questions through artful pleading. The District Court sustained White's fabrications, determining that Wheeler had not pleaded the irrelevant, nonessential, and altogether beside-the-point issues of federal law relating just to the information he sought to correct under state law.

With this decision the District Court achieved an unprecedented expansion of the artful pleading doctrine, reaching far beyond the complaint to create federal questions that any prudent inquiry would at best find completely nonessential, or completely non-existent, at worst. In allowing removal, the District Court abused its discretion by evaluating Wheeler's complaint according to an unprecedented new artful

pleading theory, and the consequence of the Court's abuse of discretion was outright abolishment of plaintiff's rights to correct personal information in third-party records under California law.

In its traditional position as a corollary to the well-pleaded complaint rule, the artful pleading doctrine is invoked to identify an essential federal question that the plaintiff *should* have pleaded had he pleaded it *well*. (Wright, Miller, & Cooper, *Federal Practice and Procedure*, Jurisdiction 3d, §3722, pp 436-469.) This was not the way the doctrine was applied against Wheeler, because his complaint articulated no cause that could originate, and hence should have been pleaded, under federal law. The District Court here immeasurably extended the doctrine to conclude that Wheeler has a removable case because he should have pleaded the beside-the-point, nonessential federal questions that relate not to his causes, but to a remote, incidental federal nexus associated with the personal information he sought to correct under California law. There is no precedent for this extraordinarily expansive interpretation of the artful pleading doctrine allowing a Court to depose plaintiff as master of his case, simply because the merest whiff of federal taint can be remotely associated with an item of personal information that is the subject of a state-law controversy.

As a consequence of the District Court's overreaching, plaintiff's state-law remedial rights were completely destroyed. Wheeler was denied due process, the CIPA has been rendered a nullity, and White's records stand uncorrected–and uncorrectable. Wheeler's access to California law requiring the correction of inaccurate records of personal information has been foreclosed.

The District Court has clearly erred. The fallacy of the District Court's expansion of the scope of the artful pleading doctrine to include the most remote federal nexus as cause for removal can be readily illustrated. For example, a man burns down a house, using gasoline as an accelerant. A federal nexus exists in that the gasoline was in interstate commerce, and federal excise taxes were paid on it. Or, for example, a man drives a car after drinking a little too much Tennessee whiskey and gets stopped by the traffic police, who find the open bottle in the car. A federal nexus exists in that whiskey bottle has a federal tax stamp on it. According to the artful pleading theory employed by the District Court against Wheeler, these remote, nonessential, and merely incidental federal nexuses provide enough of a federal question to remove the arson case and the DUI case to federal court. If this case is allowed to stand, then the courts must gird for a rush of absurdity.

Prior to this case, artful pleading was a judicial tool intended to determine whether there can be found to exist federal jurisdiction in a plaintiff's *causes* in a state-law complaint. As employed here by the District Court, federal question removal under artful pleading now extends to defendant's insinuations against the complaint on issues that are completely nonessential to plaintiff's causes. If the artful pleading doctrine may now allow federal courts to remove due to a remote federal taint of a thing, or a hypothetical federal relatedness to the use of a thing, which appears in a complaint only in regards to its disposition pursuant to state-law, then there has been achieved an enormous, unprecedented expansion of federal jurisdiction. This expansion of the artful pleading doctrine puts state jurisdiction on dangerous ground, since with this new paradigm there are theoretically few limits to federal

question jurisdiction.

Conclusion

In this case the District Court has effected an enormous and erroneous expansion of federal jurisdiction with a wrongful application of the artful pleading doctrine. A vague definition of artful pleading allowed the District Court to remake plaintiff's purely state-law case into a federal case based upon defendant's hypothetically fabricated, nonessential federal nexus. As a consequence, the Court has completely foreclosed plaintiff's state-law rights and remedies. If this case is allowed to stand, we will have witnessed an unprecedented expansion of federal jurisdiction and concomitant extinction of state law under authority of the artful pleading doctrine. This decision must be corrected, to protect state-law causes from a federal court power grab, and so that the artful pleading doctrine may benefit from much-needed definition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED Jul. 11, 2000

DAVID WHEELER, Plaintiff-Appellant,

v.

THOMAS F. WHITE & CO.; ROBERT ANGLE,
Defendants-Appellees.

No. 98-55821

D.C. No. CV-97-09564-WDK

MEMORANDUM[1]

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted June 26, 2000[2]

Before: FERGUSON, RYMER, and HAWKINS, Circuit Judges

David Wheeler appeals pro se from the district court's

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2)

order denying his motion to remand to state court and dismissing his action challenging provisions of the Internal Revenue Code and Treasury Regulations. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6), *see Halkin v. Verifone, Inc. (In re Verifone Sec. Litig.)*, 11 F. 3d 865, 868 (9th Cir. 1993), and de novo the district court's refusal to remand an action to state court, *see Bell v. City of Kellogg*, 922 F. 2d 1418, 1424 (9th Cir. 1991). We affirm.

The district court did not err in denying Wheeler's motion to remand to state court because Wheeler's complaint, in fact, raised questions of federal law. See *Bright v. Bechtel Petroleum, Inc.*, 780 F. 2d 766, 769 (9th Cir. 1986).

Wheeler's contention that the district court improperly looked beyond the four corners of his complaint lacks merit. *See id.* at 769 (determining that it is proper to submit background information to demonstrate that the complaint, in fact, raises a federal question).

The district court properly dismissed Wheeler's action for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *See* Cal. Civ. Code §§ 45-46 (libel and slander); Cal. Civ. Code § 1798 et seq.; *Cramer v. Consol. Freightways, Inc.*, 209 F.3d 1122, 1133 (9th Cir. 2000) (intentional infliction of emotional distress); *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996) (RICO); *Price v. State of Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991) (conclusory allegations insufficient to show state action).

We lack jurisdiction to review the district court's order granting monetary sanctions against Wheeler because no notice of appeal was filed from the sanctions order and this appeal was taken before that order was entered. *See Culinary & Serv.*

Employees Union v. Hawaii Benefit Admin., Inc., 688 F.2d 1228, 1232 (9th Cir. 1982).

We deny the appellees' motion for double costs without prejudice to refiling in accordance with Fed. R. App. P. 39 and 9th Cir. R. 39-1. The appellees are reminded that Fed. R. App. P. 38 allows for double costs only, not double costs and double attorney's fees.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 97-9464-WDK

HON. WILLIAM D. KELLER, JUDGE

David Wheeler

v.

Thomas F. White & Co., Inc., et al.

Attorneys Present for Plaintiffs: None Present

Attorneys Present for Defendants: None Present

Entered March 23, 1998

Proceedings:

Before the Court are: (1) Plaintiff David Wheeler's Motion to Strike Notice of Removal and Motion to Remand; and (2) Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.Proc. Rule 12(b)(6) & (7).

BACKGROUND

Plaintiff David Wheeler, who appears *in pro per*, is a

broker employed by Defendant Thomas F. White & Co., Inc. ("TFW"), a licensed securities brokerage firm. Defendant Robert Angle is President of TFW and is alleged to be the person responsible for TFW's policies, rules, and conduct. Complaint, ¶ 3.

Since 1994, Plaintiff has claimed that a Social Security Number has been attached to him in error. Plaintiff claims that he rescinded his Social Security Number in 1994, when he became aware that he was not eligible for Social Security benefits due to his religious beliefs. Complaint, ¶ 6. However, Plaintiff provides no evidence that the federal government recognizes his recission. Since 1994, Plaintiff has attempted on numerous occasions to correct all of Defendants' records to accurately reflect that he does not have a Social Security Number. Complaint, ¶¶ 8-22. Defendants have refused to do so and have continued to report Plaintiff's income to the Internal Revenue Service ("IRS") under Plaintiff's Social Security Number, using Form 1099.

On December 1, 1997, Plaintiff filed the present action in California Superior Court, alleging several causes of action based upon Defendant's failure to correct the personal information he claims is erroneous. The Complaint asserts causes of action for slander and libel, violation of liberty of conscience, economic coercion, mental suffering, and lost earnings. Complaint, ¶¶ 27-43. Additionally, the Complaint tangentially asserts RICO violations (Complaint, ¶¶ 31, 36) and violations of the California Information Practices Act ("CIPA"), Cal.Civ.Code § 1978 et seq. (Complaint, ¶¶ 7, 24-26). The Complaint seeks injunctive relief ordering Defendants: (1) to correct all records containing personal information; (2) not to disclose any false personal information about Plaintiff, and (3)

to give proper notice to anyone to whom Defendants previously disclosed false information that such information is false and should be corrected. Complaint, at 8: 14-23. The Complaint also seeks costs of suit and general, exemplary, and punitive damages. Complaint, at 8:24 - 9:10.

On December 30, 1997, Defendants removed this action to this Court, alleging federal question jurisdiction under 28 U.S.C. § 1331. Plaintiff now moves to strike the notice of removal and to remand this action, arguing that the complaint is based solely on California law. Defendants oppose this motion and move for dismissal of the complaint, arguing that Plaintiff has failed to state a claim and has failed to join indispensable parties. Plaintiff has not field an opposition to Defendants' Motion to Dismiss.

DISCUSSION

I. Plaintiff's Motion to Strike Notice of Removal and Motion to Remand

Plaintiff argues that the notice of motion should be stricken and this action should be remanded because no federal jurisdiction exists over the action. Plaintiff argues that there is no federal question within the four corners of the complaint, because all causes of action are based solely on state law. Plaintiff argues that the "well-pleaded complaint rule" makes him the master of the claims and allows him to avoid federal jurisdiction by exclusive reliance on state law. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); Westinghouse Elec. Corp. v. Newman & Holtzinger, 992 F. 2d 932, 934 (9th Cir. 1993).

Defendants counter that Plaintiff's "artful pleading" of only state law causes of action cannot conceal "what this case

is really about": a challenge to the Internal Revenue Code Provisions and Treasury Regulations that require Defendants to report Plaintiff's income under his Social Security Number on Form 1099. Opposition, at 3: 13-16. Defendants cite Bright v. Bechtel Petroleum, Inc., 780 F. 2d 766 (9th Cir. 1986), as a case in which the Ninth Circuit held that cases such as these, which purport to rely exclusively on state law, still provide federal jurisdiction.

While Plaintiff is correct that the "well-pleaded complaint rule" states that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint (Caterpillar, 482 U.S. at 392), the "artful pleading" doctrine is an exception to that rule. Bright, 780 F. 2d at 769. "A plaintiff will not be allowed to conceal the true nature of a complaint through 'artful pleading.'" Bright, 780 F. 2d at 769; Schroeder v. Trans World Airlines, Inc., 702 F. 2d 189, 190 (9th Cir. 1983). In Bright, the plaintiff brought an action for "breach of contract and a gross violation of Christian principles," alleging that his employer breached his employment contract by issuing checks to him for amounts less than the amount agreed upon. Bright, 780 F. 2d at 768-69. The court found that the plaintiff, despite artfully pleading his action as a breach of contract action, in fact was challenging federal income tax withholding laws and regulations. Id. Therefore, the court affirmed the district court's assumption of removal jurisdiction over the action. Id. at 770.

Defendants have demonstrated similar "artful pleading" in this case. Plaintiff brings causes of action for slander and libel, violation of liberty of conscience, economic coercion, mental suffering, and lost earnings. However, all of these causes of action are predicated on Defendants' reporting of

Plaintiff's income using his Social Security Number. As Defendants point out, they are required by federal law to do so. See 26 U.S.C. § 6041A(a), (f); 26 U.S.C. § 6109(d); Treasury Reg. § 1.6041-6; Treasury Reg. § 301.6109-1(a)(1)(ii)(A) & (B). Therefore, what Plaintiff is actually challenging are the provisions of the Internal Revenue Code and Treasury Regulations, despite his carefully worded complaint which attempts to avoid doing so. Accordingly, this court has jurisdiction over Plaintiff's action, and Defendants' removal and notice of removal were proper. Plaintiff's Motion to Strike Notice of Removal and Motion to Remand are denied.

II. Defendants' Motion to Dismiss for Failure to State a Claim*

CONCLUSION

Based upon the foregoing, Plaintiff's Motion to Strike Notice of Removal and Motion to Remand are both DENIED. Defendants' Motion to Dismiss is GRANTED. Because granting Plaintiff leave to amend would be futile, the Complaint is dismissed with prejudice and without leave to amend.

IT IS SO ORDERED

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* Since the judgment sought to be reviewed here in the Supreme Court relates only to the issues of removal and remand, discussion relating to the motion to dismiss is omitted.